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IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA

ANDREA KARPACS-BROWN,  
Individually and as Administratrix of the  
Estate of her Mother, Elizabeth Karpacs, and  
the Estate of her Father, Andrew Karpacs,

Plaintiff,

vs.

ANANDHI MURTHY, M.D.,

Defendant.

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CIVIL ACTION NO. 03-C-36-K

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CIVIL ACTION NO. 03-C-36-K  
WETZEL COUNTY, WV

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM**  
**ORDER DENYING: DEFENDANT'S RENEWED MOTION FOR**  
**JUDGMENT AS A MATTER OF LAW, DEFENDANT'S MOTION FOR**  
**JUDGMENT NOTWITHSTANDING THE VERDICT AND**  
**DEFENDANT'S ALTERNATIVE MOTION FOR NEW TRIAL**

CAME THE PARTIES, before the Court on March 31, 2008 to be heard on Defendant's Renewed Motion for Judgment as a Matter Of Law, Defendant's Motion for Judgment Notwithstanding the Verdict and Defendant's Alternative Motion for New Trial. After careful consideration of the arguments presented by counsel and the prior written submissions of the parties, the Court hereby DENIES the Defendant's Motions. Since the Plaintiff was the prevailing party before the jury, for the purposes of Defendant's Motions, all conflicts in the evidence are resolved in favor of the Plaintiff and all inferences that may reasonably be drawn from the evidence in favor of the Plaintiff are also taken as established. See Bowyer v. Hi-Lad, Inc., post. With this legal standard in mind, the Court's FINDINGS OF FACT and CONCLUSIONS OF LAW are as follows:

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## FINDINGS OF FACT

1. At 7:08 am on June 1, 2001, Elizabeth Karpacs arrived in the WCH Emergency Room. On admission, Mrs. Karpacs complained of abdominal discomfort, episodes of nausea and vomiting, decreased appetite and diarrhea.
2. Lab tests run immediately following Mrs. Karpacs' arrival in the emergency room revealed, among other significant findings, that Mrs. Karpacs' white blood cell count was 43,900. A white count of 43,900 is an emergency or "panic" value. At 9:08 am, Mrs. Karpacs' abdominal x-rays raised the possibility that Mrs. Karpacs was suffering from ischemic condition in her colon. After receiving this information, Mrs. Karpacs' family physician sought a surgical consult from the defendant, Dr. Murthy.
3. Dr. Murthy arrived in the WCH emergency room and saw Elizabeth Karpacs at 9:40 am. The first time Dr. Murthy saw Elizabeth Karpacs on June 1, 2001 was sometime before Mrs. Karpacs' 10:15 am admission to ICU that day. Dr. Murthy admitted that at the time of this first visit, she was aware that Elizabeth Karpacs had a distended abdomen, a WBC count of 43,900, and an abnormal abdominal x-ray.
4. These objective facts indicated that Mrs. Karpacs was suffering from a life-threatening intra-abdominal catastrophe that would be fatal if not surgically corrected. For her part, Dr. Murthy reluctantly agreed that Mrs. Karpacs was virtually certain to die without surgical intervention. Under these circumstances, the standard of care required Dr. Murthy to do four things:
  - A. Immediately begin aggressive antibiotic therapy to combat Mrs. Karpacs' infection;
  - B. Immediately begin efforts to resuscitate Mrs. Karpacs with IV fluids through a central line;
  - C. Perform exploratory surgery on Mrs. Karpacs designed to diagnose and treat her intra-abdominal condition; and

D. If Dr. Murthy was unwilling or unable to do these things, the standard of care required her to send Mrs. Karpacs to another hospital where these things would be done.

5. Dr. Murthy failed to do any of these things and Mrs. Karpacs died from a painful dead bowel as a result. In fact, Dr. Murthy didn't issue any orders at all following her examination of Mrs. Karpacs in the emergency department and never even attempted the procedure that Mrs. Karpacs needed to save her life. At most, Dr. Murthy ordered some antibiotics, quite belatedly, and gave small amounts of fluids to Mrs. Karpacs over the next several hours. Moreover, Dr. Murthy failed to inform Mrs. Karpacs or her family of the existence of the condition Dr. Murthy knew would kill Elizabeth Karpacs and instead, simply went home around 8pm that evening. Mrs. Karpacs died very early the next morning without ever seeing Dr. Murthy again.

6. It was undisputed at trial that Dr. Murthy issued no orders for antibiotics or any change to the IV fluids ordered by Terry Tallman, M.D. when she saw Mrs. Karpacs in the emergency room at 9:40 am on June 1, 2001. Dr. Murthy saw Mrs. Karpacs for a second time at 1:00 pm on June 1, 2001 in the WCH ICU. At that visit, Dr. Murthy inserted a rectal tube and a foley catheter, but again failed to issue any orders for a change in IV fluids or antibiotics. It was not until after 3:00 pm that afternoon that Dr. Murthy made any adjustment to Mrs. Karpacs' IV fluids or issued any orders for antibiotics.

7. The failure to make appropriate orders for IV fluids is particularly significant. At her deposition, Dr. Murthy admitted that she wanted to perform an exploratory laparotomy because it could have told her what was wrong with Mrs. Karpacs and given her an opportunity to correct the problem. Dr. Murthy testified that she did not provide Mrs. Karpacs with surgery because, in Dr. Murthy's opinion, Mrs. Karpacs was not sufficiently hydrated. Dr. Murthy testified as follows regarding this issue:

- Q. Was there any way to speed up Elizabeth Karpacs' fluid resuscitation?
- A. More than what we did?
- Q. More than what you did.
- A. Yeah, if we had a central Swan-Ganz pressure, then we could have hydrated her much quicker.
- Q. Why didn't you provide Elizabeth Karpacs with a Swan-Ganz or otherwise a central line?
- A. We don't have a Swan Ganz available in Wetzel County.
- Q. So is it your testimony that Elizabeth Karpacs could have been emergently rehydrated at another facility, just not Wetzel County Hospital?
- A. It's a possibility.
- Q. Why didn't you transfer her to another facility where she could have been emergently rehydrated?
- A. I was not the admitting physician.
- Q. But you could have made that call; correct?
- A. Possibly, yes.
- Q. Did you tell Dr. Tallman you were concerned about that?
- A. No. I discussed with Tallman her case, and we agreed on how we were going to manage.
- Q. So you agreed with Dr. Tallman that you weren't going to transfer her to a facility where she could have been emergently rehydrated; correct?
- A. I didn't say that. I did not tell Tallman to transfer the patient.
- Q. Why not?
- A. We felt the -- well, I discussed my plan of treatment, and he agreed with this.
- Q. Did your plan of treatment include a transfer to another facility where she could have been emergently rehydrated?
- A. No.

8. Although no Swan-Ganz catheter was available in the WCH ICU, it is undisputed that a central line was available to Dr. Murthy for emergency rehydration. It was also undisputed that a Swan-Ganz was available in Wheeling or Morgantown.

9. Following Dr. Murthy's 3:00 pm orders that included the inexcusably delayed orders for antibiotics, Dr. Murthy simply adjusted Mrs. Karpacs' fluids several times throughout the rest of the evening and waited for Mrs. Karpacs to die.<sup>1</sup> After being told to go home and come back and see their mother the next day, the Karpacs family was called

<sup>1</sup> Dr. Murthy did commence Dopamine at 10:15 pm even though she admitted in her deposition that there was no possibility that the Dopamine would do Mrs. Karpacs any good. See Murthy Dep. at 92-95.

by the hospital to come back and find out that there was nothing further that would be done for Elizabeth Karpacs. Mrs. Karpacs slipped into shock and held on to her family as she died in the ICU at 5:55 am on June 2, 2001. Murthy never returned to see her.

10. Well prior to trial, this Court set a scheduling order including deadlines for pretrial motions, including motions in limine.

11. On or about June 16, 2004, the plaintiff filed her Motion in Limine No. 5, seeking exclusion of the do not resuscitate order from evidence in the case, contending that it was irrelevant to the issues in the case and that its admission into evidence would be unfairly prejudicial.

12. On or about January 21<sup>st</sup>, 2005, the plaintiff brought her Motion in Limine No. 5 before this Court for a duly noticed hearing. Dr. Murthy failed to appear.

13. At that hearing, the Court GRANTED the Plaintiff's Motion and Ordered the plaintiff to submit a proposed order reflecting that decision. The plaintiff complied and on February 10, 2005, she served Dr. Murthy with her proposed Order.

14. Dr. Murthy did not respond. She did not object to the plaintiff's proposal or file a competing Order.

15. On September 27, 2005, the parties appeared before the Court for a status conference. At that conference, Dr. Murthy asked the Court to establish new deadlines for pre-trial motion practice. The Court granted Dr. Murthy's request. See Amended Scheduling Order (entered 10/5/05).

16. Dr. Murthy then submitted nothing under the deadlines she asked the Court to establish.

17. On January 24, 2006, and having received no response from Dr. Murthy to her proposed order granting Motion in Limine No. 5, the plaintiff filed a Motion to enter her

proposed findings of fact and conclusions of law. See "Plaintiff's Motion for the Entry of Certain Pretrial Orders."

18. Dr. Murthy again failed to respond in any fashion.

19. Thus, on February 18, 2006, the Court entered its "Findings of Facts and Conclusions of Law Regarding Plaintiff's Motion in Limine No. 5."

20. Through that Order, the Court ruled that the DNR could not be used at trial either to show that Mrs. Karpacs' death was hastened by the DNR or that the DNR in any way aggravated or affected her damages.

21. These matters were tried to a jury in January of this year before the Circuit Court of Wetzel County, (Karl, J. presiding) and the jury found in favor of the Plaintiff on all issues. The jury awarded \$1,000,000.00 in wrongful death damages to each surviving child of Elizabeth Karpacs. Significantly, the verdict form did not divide the wrongful death damages into economic and non-economic components. \$1,000,000.00 was also awarded to the estate for Mrs. Karpacs' survivorship claim.

22. At trial, the Plaintiff presented detailed expert testimony on the issues of liability and causation from the Plaintiff's medical expert, Dr. Battle, a board-certified general surgeon.

23. Dr. Battle testified that Dr. Murthy's conduct failed to meet the standard of care by a wide margin, and that the failure to meet the standard of care directly caused Mrs. Karpacs' suffering and death. Dr. Battle described Dr. Murthy's failure to operate to save the life of her patient as an egregious one and agreed that Dr. Murthy had, in effect, abandoned Elizabeth Karpacs to a painful death.

24. On this issue of Mrs. Karpacs' pain, Dr. Battle's un-contradicted testimony was that Mrs. Karpacs was suffering from a serious painful condition. He further testified

that such condition was in need of emergency surgical correction and that Mrs. Karpacs should have been promptly placed under anesthesia to facilitate the operation.

25. Plaintiff also presented detailed and comprehensive testimony from Elizabeth Karpacs' family regarding the damages in this matter. The evidence of the Karpacs damages and loss was essentially undisputed at trial.

26. Mrs. Karpacs' children, Andrea, Carol and Kevin testified in detail about how they were deprived of a loving mother healthy enough to live independently at home with her husband.

27. Mrs. Karpacs' children also testified about the terrible grief endured by the family as a consequence of Dr. Murthy's malpractice and the loss of the company of Elizabeth Karpacs, as well as her services, support and guidance. Testimony covered a wide array of normal family experiences and contributions from Mrs. Karpacs that were lost to the family as a consequence of her death, including her love and advice, the comfort of her presence and her services to her children and grandchildren, including child care and meal preparation.

28. Having observed directly the demeanor of the witnesses at trial, the Court finds the testimony of the decedent's children to have been highly credible and a moving tribute to the deceased's value to her family and the esteem in which she was held by her children and her late husband.

29. Evidence adduced by Plaintiff through Dr. Battle showed while Mrs. Karpacs had some medical conditions, her overall state of health was not nearly so bleak as the Defendant had hoped the jury would believe.

30. During trial, the Defendant objected to the enforcement of the Court's prior order with regard to Mrs. Karpacs' DNR.

31. However, the Defendant failed to proffer any testimony relevant to the DNR or to identify any relevant purpose for introducing the Do Not Resuscitate Order before trial or during trial.

32. The Defendant likewise failed to proffer any excusable neglect as to why she did not appear at the hearing on the plaintiff's Motion in Limine, respond to the plaintiff's proposed order, or object to the plaintiff's subsequent motion to enter her proposed order.

33. At the hearing on the post-trial motions in this case, Defendant indicated that it desired to introduce the DNR to suggest that Dr. Murthy had "no obligation" to Mrs. Karpacs once she had agreed to a DNR.

34. Defendant proffered no evidence at trial that would support the argument that persons who have executed a DNR are no longer entitled to competent medical treatment.

35. Furthermore, no evidence was adduced or proffered at trial that Dr. Murthy even knew about the DNR Order or that the existence of the DNR Order affected her conduct in any way.

36. The evidence at trial, viewed in a light most favorable to the Plaintiff indicated that Dr. Murthy grossly deviated from the Standard of Care, failed to take strong action in the face of Elizabeth Karpacs' serious symptoms and ultimately left her to die at Wetzel County Hospital without informing the family of what Dr. Murthy knew to be an extremely grave condition that would likely claim Mrs. Karpacs' life.

37. This is the second multi-million dollar award against Dr. Murthy in Wetzel County in less than a year. In both cases, experts testified that Dr. Murthy's treatment of her patients not only constituted negligence but actually went beyond the pale to the level of a gross deviation from the standard of care – amounting in Roberts v. Murthy to performing experimental surgery and in this case, to simply abandoning her patient.



However, no evidence of Dr. Murthy's prior negligent treatment of Kathy Roberts was adduced at the Karpacs trial.

38. Dr. Murthy has now moved for post-trial relief, asserting various errors.

### CONCLUSIONS OF LAW

Having made the above-stated Findings, the Court makes the following Conclusions of Law:

39. Defendant has moved for a new trial.

40. In regard to Defendant's Motion for a New Trial, the legal standard is a high one on the moving party and the law imposes a heavy burden on the Defendant herein in seeking a new trial from the Court.

41. Under West Virginia law, a trial judge "should rarely grant a new trial" In re State Public Bldg. Asbestos Litigation, 193 W.Va. 119 (1994). "Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done . . . Ultimately the motion invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited." Id.

42. Defendant has also moved for Judgment notwithstanding the verdict. Here also, the Defendant faces a heavy burden: "in considering whether a motion of judgment notwithstanding the verdict under Rule 50(b) of the West Virginia Rules of Civil Procedure should be granted, the evidence should be considered in the light most favorable to the plaintiff." Bowyer v. Hi-Lad Inc., 216 W.Va. 634, 609 S.E.2d 895 (2004) (emphasis added). Furthermore, "A jury's verdict is accorded great deference when it involves the jury weighing conflicting evidence." McNelly v. Frich, 187 W.Va. 26, 29, 415 S.E.2d 267, 270 (1992). "When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will

not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it." Syl. Pt. 4, Laslo v. Griffith, 143 W.Va. 469 (1958).

43. Defendant has also renewed her motion for Judgment as a matter of law, contending that there are no disputed issues of material fact and that the Defendant is entitled to Judgment in this case as a matter of law.

44. This Court is instructed by West Virginia law not to re-weigh the evidence or to invade the province of the jury in determining the facts, in ruling upon such motions: "[t]o weigh the evidence and to resolve questions of fact when the oral testimony of witnesses regarding them is conflicting is peculiarly the province of the jury and should not be disturbed by the court." Yuncke v. Welker, 128 W.Va. 299, 305 "When the verdict of a jury is in proper form, is duly signed by its foreman, and represents the final agreement of the jury, it should be received and entered by the trial court." State ex rel. Rufus v. Easley, 129 W.Va. 410, 415 (1946).

45. In light of the strong evidence put forth by the Plaintiff in this case on every issue, and viewing that evidence in the light most favorable to the Plaintiff, the Defendant's Motions for a New Trial, for Judgment Notwithstanding the Verdict and for Judgment as a Matter of Law cannot meet the applicable standard and Defendant's Motions must be and are DENIED.

46. As stated above, the Plaintiff presented detailed expert testimony on the issues of liability and causation from Dr. Battle, as well as detailed and comprehensive testimony from Elizabeth Karpacs' family regarding the damages in this matter. The evidence adduced at trial, viewed in a light most favorable to the Plaintiff indicated that Dr. Murthy grossly deviated from the Standard of Care, failed to take strong action in the face of Elizabeth Karpacs' serious symptoms and ultimately left her to die at Wetzel County Hospital without informing the family of what Dr. Murthy knew to be an extremely grave

condition that would likely claim Mrs. Karpacs' life. As a result, the Karpacs' family was deprived of a loving mother healthy enough to live independently at home with her husband. The Karpacs' family members testified about the terrible grief endured by the family as a consequence of Dr. Murthy's malpractice and the loss of the company of Elizabeth Karpacs, as well as the services she would have provided to her children and her husband while he lived and her support and guidance.

47. Accordingly, the jury's verdict is well-supported by the evidence and the Defendant has failed to adduce any evidence or legal justification as to why the jury's judgment should be overturned.

48. A jury verdict should not be overturned where substantial justice has been done the parties. The Defendant has, at bottom, failed to show any respect in which substantial justice was not done in this case and for this reason also, its Motions should be and are DENIED. In re State Public Bldg. Asbestos Litigation, supra

49. The Court will address, seriatim, the Defendant's specific assertions of error.

50. Defendant's Assignment of Error No. 1, claiming that the Court erred in denying the Motion for Judgment as a Matter of Law at the close of the Plaintiff's case amounts to a restatement of its Motion for Judgment Notwithstanding the Verdict, was not supported by any citations to the record or legal authority and was therefore rejected.

51. Defendant's Assignment of Error No. 2, asserting that this Court erred in denying the Defendant's Motion for Judgment as a Matter of Law at the close of all the evidence amounts to a restatement of the Defendant's Motion for Judgment Notwithstanding the Verdict and as the asserted error is not supported by any citations to the record or legal authority, it should be rejected.

52. Defendant's Assignment of Error No. 3 refusing to permit the Defendant to call Dr. Abrahams, a proffered expert witness, to give undisclosed new opinions that were never provided to the Plaintiff until the middle of trial is also rejected.

53. As set forth in detail in this Court's Order regarding Defendant's Motion to Complete the Trial Record and Plaintiff's Memorandum regarding the same, trials in West Virginia are not to be conducted by ambush.

54. In this case, the Defendant disclosed a host of brand new opinions for Dr. Abrahams on the fourth day of trial, after the Plaintiff had rested, and now assigns the exclusion of those opinions from evidence as error.

55. No reason was given as to why the undisclosed opinions — first mentioned over five years into the case and three years after Dr. Abrahams' deposition and perhaps most importantly, the day after the Plaintiff rested, should have been allowed. Compare Capper v. Gates, 193 W.Va. 9 (1994), wherein the Supreme Court of Appeals stated:

As for Mr. Gates' claim that the circuit court erred by refusing to allow him to present two experts as rebuttal witnesses, which he identified for the first time two days after trial began, we disagree. The Appellant's Reply Brief offers the excuse that Mr. DiMagno's testimony "caught the defendant by surprise". Appellant's Reply Br. at 13-14. Therefore, Mr. Gates was unable to determine that the experts were needed as rebuttal witnesses before the trial began. Yet the evidence reveals that Mr. DiMagno's expert reports were submitted six months before trial. We find no reason that Mr. Gates shouldn't be expected to comply with the circuit court's pretrial order under Rule 16, W.Va.R.Civ.Pro., [1988] requiring disclosure of experts before trial. Id. at 15.

56. Where as here, Defendant cannot even suggest surprise at the Plaintiff's evidence, there was no basis whatsoever to allow additional, undisclosed opinions of Dr. Abrahams.

57. Furthermore, any objection whatsoever to the exclusion of Dr. Abrahams is waived by the Defendant's failure to appear at the hearing or file any opposition to Plaintiff's Motion in limine regarding his testimony. See W.Va. Trial Ct.R. 22.05; State

Rd. Comm v. Ferguson, 148 W.Va. 742 (1964), State ex rel. Cooper v. Caperton, 196 W.Va. 208 (1996).

58. As set forth in detail in this Court's Order regarding Defendant's Motion to Complete the Trial Record and Plaintiff's Memorandum regarding the same, Defendant never opposed Plaintiff's Motion in limine seeking to exclude Dr. Abrahams before trial, despite multiple chances to do so and failed to appear at the hearing on said Motion.

59. The Defendant's effort to identify new, wholly undisclosed opinions of Roger Abrahams during the middle of the trial and proffer them to the Court was properly and soundly rejected by this Court. The third assignment of error is therefore rejected.

60. Defendant's Assignment of Error No. 4, regarding the Court's pretrial, in limine, ruling regarding the Do Not Resuscitate Order was appropriate.

61. The Defendant's suggestion to the contrary in its motion is unsupported by any citations to the record or pertinent legal authority. The Defendant clearly waived its objections to the Court's ruling on the DNR motion by failing to respond or appear at the hearing on motions in limine held well in advance of the trial.

62. This Court granted unopposed the Plaintiff's pretrial motion in limine regarding the Do Not Resuscitate Order. The Order provided that the Do Not Resuscitate Order could not be used by the Defendant, or any party, in connection with the issues of liability and damages.

63. There was no relevant purpose for which the Do Not Resuscitate Order could be introduced into evidence. Moreover, the Defendant never identified any relevant purpose for introducing the Do Not Resuscitate Order before trial or during trial.

64. Finally, the Defendant failed to proffer any evidence it would have introduced concerning the DNR had the Court ruled otherwise than it did. The failure to

appropriately proffer excluded evidence, so that a reviewing Court can determine the effect of the ruling on the trial, waives the right to challenge the evidentiary ruling.

65. The Defendant having failed to appear at the hearing on the plaintiff's Motion in Limine No. 5; having failed to object to the plaintiff's proposed order on that Motion; and having failed to oppose the plaintiff's subsequent motion for the entry of her order has waived any right to object later to the results. See W.Va. Trial Ct.R. 22.05; State Rd. Comm v. Ferguson, 148 W.Va. 742 (1964), State ex rel. Cooper v. Caperton, 196 W.Va. 208 (1996).

66. Even if the Defendant had not waived her right to object to the Trial Court's ruling, the Trial Court's ruling was sound. No evidence ever adduced or proffered by the Defendant indicated that the Do Not Resuscitate Order affected Dr. Murthy's conduct in any way.

67. In fact, there was no evidence adduced at trial or proffered by the Defendant that Dr. Murthy even knew that the Do Not Resuscitate Order had been entered after her abandonment of Elizabeth Karpacs left the family with no other choice late on the evening of June 2<sup>nd</sup>, 2001.

68. Defendant's Assignment of Error No. 5 claiming it was error for the Court to adhere to the in limine order granted before trial without opposition by the Defendant during the cross-examination of Andrea Karpacs-Brown is without merit.

69. As with the previous asserted error, the Defendant provides no citations to the record, nor any legal authority in support of its position.

70. The Defendant's position is waived by the failure of the Defendant to support it, (see W.Va. Trial Ct.R. 22.05; State Rd. Comm v. Ferguson, 148 W.Va. 742 (1964), State ex rel. Cooper v. Caperton, 196 W.Va. 208 (1996)).

71. Furthermore, the position of the Defendant in connection with the DNR order and the cross-examination of Andrea Karpacs-Brown and Kevin Karpacs is without merit. As stated previously, no evidence was adduced or proffered at trial that Dr. Murthy even knew about the DNR Order or that the existence of the DNR Order affected her conduct in any way.

72. The DNR had nothing to do with the issues of the case and was properly excluded from evidence.

73. Defendant's Assignment of Error No. 6, asserts Defendant's contention that the Circuit Court abused its discretion in instructing the jury on Dr. Murthy's deviation from the Standard of Care and failing to communicate with the family. This assignment of error is without merit or legal support.

74. Dr. Battle specifically testified that a doctor in Dr. Murthy's position would be obligated to keep the patient and family informed of the progress of Elizabeth Karpacs' severe, life-threatening condition.

75. Although Dr. Murthy attempted to change her story at trial regarding a conversation she had had with the family, the jury was entitled not to credit Dr. Murthy's altered testimony instead to believe the testimony as it existed at the time of Dr. Murthy's two depositions (and confirmed by exhaustive written discovery) namely that she could not recall any conversations with the family in which she advised them or Mrs. Karpacs of the life-threatening condition faced by Mrs. Karpacs, the surgical alternatives or the prospects for moving Mrs. Karpacs to another hospital where she could be saved.<sup>2</sup>

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<sup>2</sup> Dr. Murthy's alteration of her testimony at trial is of a piece with her strategy in the Roberts v. Murthy case, in which highly material changes were also made for the doctor's trial testimony as compared with pretrial deposition and written discovery responses. See Order Granting Plaintiff's Motion for Attorney's Fees at ¶¶ 58-63.

76. The Defendant's asserted error is therefore without merit as expert testimony supported the deviation from the standard of care.

77. Defendant's Assignment of Error No. 7 alleges claims that this Court abused its discretion in instructing the jury on Elizabeth Karpacs' pre-death pain and suffering.

78. However, the undisputed expert testimony at trial established that Mrs. Karpacs' condition was a painful one and that she died needlessly as a result of it.

79. Dr. Battle's un-contradicted testimony was that Mrs. Karpacs was suffering from a serious painful condition. He further testified that such condition was in need of emergency surgical correction and that Mrs. Karpacs should have been promptly placed under anesthesia to facilitate the operation.

80. This assignment of error is therefore without merit.

81. Defendant's Assignment of Error No. 8 claims that the verdict of the jury is inconsistent with the evidence and it amounts to a restatement of its Motion for Judgment Notwithstanding the Verdict. As detailed above, the contention is not supported by the record or legal authority and is therefore rejected.

82. The Defendant's ninth assignment of error is a restatement of its eighth assignment, and its Motion for Judgment Notwithstanding the Verdict, and should be rejected for the same reasons.

83. Defendant's Assignment of Error No. 10, arguing that "substantial rights of the Defendant were prejudiced by the jury's failure to render a verdict responsive to and consistent with the instructions given to the jury by the Court" is without merit.

84. This assignment of error is undercut by the Defendant's failure to identify any such rights or legal authority supporting the existence of such rights or any inconsistencies of the verdict with the instructions or any citations to the record or argumentation supporting the tenth assignment of error which should accordingly be rejected out of hand.



85. The Defendant's Assignment of Error No. 11 is a restatement of its eighth and ninth assignments of error using different language, as well as the Defendant's Motion for Judgment Notwithstanding the Verdict, and should be rejected for the same reasons previously stated.

86. The Defendant's Assignment of Error No. 12, claiming that the evidence was insufficient to support the amount of the verdict for the family members' grief is not supported by any legal authority or the evidence in the case.

87. As the Supreme Court of Appeals has explained:

2. " 'Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption.' Syl. Pt., Addair v. Majestic Petroleum Co., Inc., 160 W.Va. 105, 232 S.E.2d 821 (1977)." Syl. pt. 5, Roberts v. Stevens Clinic Hosp. Inc., 176 W.Va. 492, 345 S.E.2d 791 (1986). Capper, supra, Syl. Pt. 2.

88. The jury's verdict in this case does not come close to meeting the high standard of monstrosity or unreasonableness set forth in Capper and Addair, requiring that only outrageous verdicts be set aside.

89. As a further matter, the evidence at trial did not support the Defendant's bald assertions in her twelfth assignment of error that Mrs. Karpacs suffered from "end-stage COPD/emphyszema." The evidence adduced by Dr. Battle was that while Mrs. Karpacs had some medical conditions, her overall state of health was not nearly so bleak as the Defendant had wanted the jury to believe.

90. The Defendant's failure to support its contention that Mrs. Karpacs' life or her pain was worth less because of her age is also not supported with any citations to the record, nor any legal authority.

91. The Defendant's Assignment of Error No. 13 "suggesting" juror misconduct without providing any factual development or basis or support for the Defendant's

position provides no justification for awarding a new trial. At the hearing on Defendant's post-trial Motions, this assignment of error was withdrawn.

92. The Defendant's Assignment of Error No. 14 and Defendant's Assignment of Error No. 15 are simply declarative statements duplicative of the Defendant's Motion for Judgment as a Matter of Law and unsupported by any citations to the record or legal argumentation and should therefore be considered waived and also self-evidently without merit.

93. The Defendant's Assignment of Error No. 16 regarding the application of the MPLA to the and specifically the \$1,000,000.00 1986 cap is dealt with in detail in this Court's Order regarding Defendant's Motion to Modify or Alter the Jury Verdict.

WHEREFORE, for the foregoing reasons, as well as all other appearing at law and of record, The Court hereby Orders, Adjudges and Decrees that the Defendant's Motions for a New Trial, for Judgment as a Matter of Law and for Judgment Notwithstanding the Verdict are hereby DENIED in all respects.

ALL OF THE ABOVE IS SO ORDERED THIS 26<sup>th</sup> day of JULY, 2008.

  
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Mark A. Karl, Circuit Judge